Supreme Court U.S.
FILED
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No. 051581

IN THE

Supreme Court of the United States

CLIFFORD E. HOTTE,

Petitioner,

—v.—

USA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL APPENDIX

JOHN W. MITCHELL, ESQ.
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Attorney for Petitioner

TABLE OF CONTENTS

1. United States v. Hotte, 01-cv-4336, Memorandum and Order of Johnson, J. U.S.D.J., E.D.N.Y. dated February 1, 2005..... SA-2

2. United States v. Hotte, 01-cv-4336, Memorandum and Order of Johnson, J. U.S.D.J., E.D.N.Y., dated March 29, 2005..... SA-7

3. United States v. Hotte, 05-1752-pr, United States Court of Appeals for the Second Circuit, Summary Order, denying Petition for Re-hearing *En Banc*, dated May 24, 2006..... SA-12

UNTIED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

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CLIFFORD E. HOTTE,

Petitioner, 01 CV 4336 (SJ)

-against - MEMORANDUM AND ORDER

UNTIED STATES OF AMERICA,

Respondent.

----------X

APPEARANCES:

JOHN W. MITCHELL
600 Third Avenue, 32nd Floor New York, NY 10016
Attorney for Petitioner.

UNTIED STATES ATTORNEYS OFFICE
One Pierrepont Plaza, 16th Floor
Brooklyn, NY 11201
By: Emily Berger Attorney for Respondent.

JOHNSON, Senior District Judge:

Petitioner brings this motion for habeas relief pursuant to 28 U.S.C. § 2255, requesting that the Court vacate or set aside his sentence. For the reasons stated below, Petitioner's application is DENIED.

BACKGROUND

Petitioner is the former President, CEO, and Chairman of the Board of Directors for Health Management, Inc. ("HMI"), a publicly traded company. U.S. v. Hotte, 189 F.3d 462 (2d Cir. 1999).

Petitioner was convicted, after a jury trial, of conspiracy to commit securities fraud under 18 U.S.C. § 371, securities fraud under 15 U.S.C. § 78(j), mail fraud under 18 U.S.C. § 1341, and wire fraud under 18 U.S.C. § 1343. Id. Petitioner was sentenced to 108 months imprisonment, a $250,000 fine, restitution in the amount of $9,571,428, three years supervised release and a $700 special assessment. Id.

The charges stemmed from a scheme initiated by Petitioner that was designed to falsely inflate the company's earnings. Id. When the scheme was discovered, HMI's stock price plummeted. Id. At sentencing, this Court calculated the extent of Petitioner's fraud by multiplying the total number of HMI common shares owned by innocent investors, which amounted to 7,480,000 shares, by the drop in the price of HMI's stock, as measured by the difference between HMI's average stock price during the fraud scheme ($12.21 per share) and the price after the scheme was disclosed ($3.25 per share). The total came out to approximately $67 million. Id. Petitioner's base offense level was increased by seventeen points based on this estimated loss. (Pet. at 5.) The base offense level was originally six, but because Petitioner also received a four-level enhancement for leadership role, a two-level enhancement for abuse of position of trust and a two-level enhancement for more than minimal planning, the final offense level was thirty-one. (Resp. Mem. Law Opp'n Pet. at 3.) The sentence was thereby increased from 15-21 months to 108-135 months. (Pet. Mem. Law at 21, 25.)2

DISCUSSION

Petitioner asserts that his sentence was imposed in violation of the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), in that the sentence was determined based on evidence - specifically, the amount of monetary loss - that was not presented to a jury to be proven beyond a reasonable doubt. (Pet. at 4-5.) Respondent argues that Apprendi does not apply retroactively on collateral review, but Respondent's discussion of retroactivity does not address the question of when Petitioner's claim became final. (Resp. Mem, Law Opp'n Pet. at 4-9.)

The Supreme Court decided Apprendi on June 26, 2000. The Second Circuit has held that Apprendi does not apply retroactively to initial or successive 28 U.S.C. § 2255 petitions for habeas relief. Coleman v. United States, 329 F.3d 77 (2d Cir. 2003) (considering initial 28 U.S.C. § *2255* petition); Maldonado v. U.S., 344 F.3d 244, 245 (2d Cir. 2003) (considering successive 28 U.S.C. § 2255 petition). Petitioner is therefore only eligible for relief if his conviction became final after June 26, 2000. For the purposes of 28 U.S.C. § *2255,* a conviction becomes "final" when the Supreme Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires. Clay v. United States, 537 U.S. 522 (2003).

In the present case, Petitioner's conviction became final on June 29, 2000, when the Supreme Court denied his petition for a it of certiorari. (Pet. at 2.) Since Petitioner's case was still pending on direct review at the time Apprendi was decided, the Apprendi rule applies to his case, Griffith v. Kentucky, 479 U.S. 314, 322 (1987), and this Court may consider the question of whether Petitioner's sentencing was in violation of Apprendi.

However, as the Second Circuit has noted, "nothing in the Court's holding in Apprendi or its explication of the holding ...

alters a sentencing judge's traditional authority to determine those facts relevant to selection of an appropriate sentence within the statutory maximum." U.S. v. Garcia, 240 F.3d 180, 183 (2d Cir. 2001). Rather, Apprendi requires that facts, other than prior convictions, that increase the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Apprendi, 530 U.S. 466.

In this case, at the time of Petitioner's conviction, 15 U.S.C. § 78ff(a) permitted a sentence of 120 months for security fraud convictions.* On this count alone, therefore, Petitioner could have been sentenced to a longer period of incarceration without exceeding the statutory maximum. As such, Apprendi does not apply. See also Masley v. U.S., No. 01-CV-0698, 2002 WL 398806, at *1 (E.D.N.Y. Jan. 28, 2002) (rejecting Apprendi challenge to 70 month sentence for securities fraud violation because sentence was less than the 120 months permitted by 15 U.S.C. § 78 ff(a)).

[* Footnote 1. In 2002 the statute was amended and now permits a sentence of up to twenty years incarceration. 15 U.S.C. § 78ff(a).]

CONCLUSION

For the reasons discussed herein, Petitioner's motion for relief is DENIED.

For a certificate of appealability to issue, petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A substantial showing "does not require a petitioner to demonstrate that he would prevail on the merits, but merely that `reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" Santana v. U.S., 2005 WL 180932, at *7

(S.D.N.Y. Jan. 26, 2005) (quoting Rhagi v. Artuz,309 F.3d 103, 106 (2d Cir. 2002)) (internal quotation marks and citation omitted). Petitioner has made no substantial showing of the denial of a constitutional right in this case. Accordingly, this Court denies a certificate of appealability. SO ORDERED.

Dated: February 1, 2005
Brooklyn, NY

/s/ Sterling Johnson
Senior U.S.D.J.

UNTIED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

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CLIFFORD E. HOTTE,

Petitioner, 01 CV 4336 (SJ)

-against -

MEMORANDUM AND ORDER

UNTIED STATES OF AMERICA,

Respondent.

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APPEARANCES:

JOHN W. MITCHELL
600 Third Avenue, 32nd Floor New York, NY 10016
Attorney for Petitioner.

UNTIED STATES ATTORNEYS OFFICE
One Pierrepont Plaza, 16th Floor
Brooklyn, NY 11201
By: Emily Berger Attorney for Respondent.

JOHNSON, Senior District Judge:

Petitioner brought a motion for habeas relief pursuant to 28 U.S.C. § 2255, requesting that the Court vacate or set aside his sentence. On February 4, 2005, this Court issued an Order denying the § 2255 motion and declining to issue a

Certificate of Appealability. Presently before this Court is a Motion by Petitioner requesting that the Court reconsider the earlier Order or, in the alternative, issue a Certificate of Appealability. For the reasons stated herein, Petitioner's Motion is granted in part and denied in part.

BACKGROUND

Petitioner is the former President, CEO, and Chairman of the Board of Directors for Health Management, Inc. ("HMI"), a ublicly traded company. U.S. v. Hotte, 189 F.3d 462 (2d Cir. 1999).

Petitioner was convicted, after a jury trial, of conspiracy to commit securities fraud tinder 18 U.S.C. § 371, securities fraud under 15 U.S.C. § 78(j), mail fraud under 18 U.S.C. §1341, and wire fraud under 18 U.S.C. § 1343. M. Petitioner was sentenced to 105 months imprisonment, a $250,000 fine, restitution in the amount of $9,571,428, three years supervised release and a $700 special assessment. Id.

The charges stemmed from a scheme initiated by Petitioner that was designed to falsely inflate the company's earnings. Id. When the scheme was discovered, HMI's stock price plummeted. Id. At sentencing, this Court calculated the extent of Petitioner's fraud by multiplying the total number of HMI common shares owned by innocent investors, which amounted to 7,480,000 shares, by the drop in the price of HMI's stock, as measured by the difference between HMI's average stock price during the fraud scheme ($12.21 per share) and the pride after the scheme was disclosed ($3,25 per share). The total came out to approximately $67 million. Id. Petitioner's base offense level was increased by seventeen points based on this estimated loss. (Pet. at 5.) The base offense level was originally six, but because Petitioner also received a four-level enhancement for leadership role, a two

level enhancement for abuse of position of trust and a two-level enhancement for more than minimal planning, the final offense level was thirty-one. (Resp. Mem. Law Opp'n Pet. at 3.) The sentence was thereby increased from 15-21 months to 108-135 months. (Pet. Mem. Law at 21, 25.)

DISCUSSION

Petitioner asserted that his sentence was imposed in violation of the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 456 (2000), in that the sentence was determined based on evidence. (Pet. at 4-5.) The Court has determined that Apprendi does apply to Petitioner's sentencing because Apprendi was decided on June 26, 2000, and Petitioner's conviction became final three days later, on June 29, 2000, when the Supreme Court denied his petition for a writ of certiorari. (Pet. at 2.)

The Court initially held that application of Apprendi would not affect Petitioner's sentence because the sentence was within the statutory maximum of 120 months. Petitioner argues that the relevant statutory maximum is that which could be imposed based on the facts charged in the indictment and found by the jury beyond a reasonable doubt, not the overall statutory maximum prescribed by the Legislature. Petitioner asserts that because the jury only found that he was guilty of "fraud" without making any findings as to the amount Petitioner profited from the fraud, the amount that others lost from the fraud, the extent of planning, whether abuse of the public trust occurred, or Petitioner's personal role as compared to that of others involved, the jury findings only support a base offense level of six and a sentence of zero to six months incarceration.

The Court finds that while this argument appears to be correct, relief is barred by a second consideration that the

Court did not reach in the initial Order because of the findings regarding Apprendi: counsel's failure to raise and preserve the claim at trial or on direct appeal to the Second Circuit. Admittedly, Petitioner's trial was concluded and the brief to the Second Circuit submitted before the Apprendi decision was issued by the Supreme Court. However, despite the apparent harshness and illogic of a rule that requires defendants to assert legal arguments that are not supported by existing precedent or else lose those arguments forever, it is now well-settled that § 2255 petitions must be dismissed unless a petitioner has shown "cause" for failing to raise claims on direct appeal. See, ems., Campino v. United States, 968 F.2d 187, 189 (2d Cir. 1992). The lack of legal precedent for a position does not constitute "cause." Jones v. U.S., 2004 WL.1013315, *3 (N.D.N.Y. Apr. 20. 2) (citing Unite Jtates v Smith, 241 F.3d 546, 54$-49 (7th Cir. 2001). Courts have therefore dismissed § 2255 petitions raising Ap[p]rendi claims that were not raised on direct appeal, even when the direct appeal was concluded prior to the Apprendi decision. E.g., id. This Court must do so as well.

CONCLUSION

For the reasons stated herein, Petitioner's motion for reconsideration is denied. However, in an abundance of caution, the Court finds that a Certificate of Appealability should be issued.

SO ORDERED.

Dated: March 29, 2005
Brooklyn, N.Y.

/s/ Sterling Johnson
Senior U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

Date:	May 24, 2006
Docket Number:	05-1752-pr
Short Title:	Hotte v. USA
DC Docket Number:	01-cv-4336
DC:	EDNY (BROOKLYN)
DC Judge:	Honorable Sterling Johnson

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 24thday of May two thousand six.

Clifford E. Hotte,
Petitioner-Appellant,

v.

USA,
Respondent-Appellee.

A petition for panel rehearing and a petition for rehearing *en banc* having been filed herein by the appellant Clifford E.

Hotte. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing *en banc* has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk

By /s/ William M. Heller
Motion Staff Attorney